Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	WC Docket No. 2-202
	)	
Verizon's Petition for Emergency	)	
Declaratory And Other Relief	)	

REPLY COMMENTS OF TELSTAR INTERNATIONAL, INC.

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Reply Comments of Telstar International, Inc.

INTRODUCTION

TELSTAR INTERNATIONAL, INC. ("TELSTAR"), by its undersigned counsel respectfully submits these Reply Comments in the above proceeding. In general, TELSTAR urges the Commission to reject Verizon's petition for Emergency Relief. The relief Verizon requests is unnecessary because the United States Bankruptcy Code adequately addresses the concerns raised in Verizon's Petition. It would be both inappropriate and unnecessary for the Commission to allow Verizon to rewrite its tariffs to do an end-run around existing bankruptcy law. If Verizon believes that its rights are not adequately addressed by the bankruptcy code, it should raise its concerns issues with Congress – not here.

More specifically however, TELSTAR's comments focus on issues raised in the comments submitted by the American Public Communications Council ("APCC"). APCC has used the opportunity of Verizon's Petition for Emergency Relief to assert its own *de facto* Petition similarly aimed at circumventing the bankruptcy code but also aimed at modifying Commission decisions in other dockets. Not only does APCC requests Commission assistance to obtain special treatment in its quest to recover losses ahead of other trade creditors in the wake of a tide of telecommunications carrier bankruptcies, but it also provided thinly veiled attempt to modify existing Commission rules regarding dial-around compensation already addressed by the Commission in Docket No. 96-128. The Commission should not accept APCC's attempts to use this proceeding as a vehicle to undo existing Commission regulations regarding dial-around compensation -- regulations which APCC relentlessly pursued – and obtained —at the Commission less than eight months ago. Such an attempt is wholly inappropriate in the context of this proceeding and must be rejected.

BACKGROUND

TELSTAR is a switch-based reseller of telecommunications services with relationships with nearly 100 telecommunications service providers. In the last year and a half, TELSTAR has witnessed at least 30 of its vendors and/or customers file for protection from creditors under Chapter 11 of the United States Bankruptcy Code. Consequently, TELSTAR is acutely aware of the difficulties borne by companies trying to do business in the current telecommunications climate. TELSTAR has no doubt that APCC, like other vendors and customers of bankrupt telecom companies, has suffered financial loss as a result of these bankruptcies. APCC's request to have the Commission shield it from existing bankruptcy law is nevertheless inappropriate. Many trade groups have experienced serious losses during these difficult times. If each of these groups were successful in convincing their regulatory agencies to rewrite rules to bump them to the front of the line, the bankruptcy code would be seriously undermined. The bankruptcy code was drafted by Congress to ensure the orderly distribution of the debtor's estate. Any agency rules promulgated by this Commission to give one group preferential treatment over another would contravene Congress' intent and undermine existing bankruptcy law.

I. **<u>APCC's Request For Permission to Collect Prepayment From IXCs Is In Direct Conflict With Existing Bankruptcy Law</u>.**

APCC's Request for Advance Payments From IXCs Must Be Rejected as Inconsistent with Section 547 of the Bankruptcy Code.

The Commission must reject APCC's request for permission to require IXCs to provide advanced payments or deposits for dial-around compensation.[1] APCC's request directly conflicts with both bankruptcy law and Commission regulations. First, APCC's attempts to maneuver around other innocent creditors contravene Section 547 of the bankruptcy code addressing debtor preferences. Specifically, Section 547 prevents a debtor from favoring one creditor over another. APCC's proposal to require some non-bankrupt IXCs to prepay dial-around compensation would indeed run afoul of Section 547 requirements.

Currently, all IXCs to which a local exchange carrier (LEC) routes a coinless payphone call must compensate the Payphone Service Provider (PSP) for the completed call regardless of whether the call is completed by the IXC itself or handed off to a switch-based reseller (SBR).[2] This IXC obligation is informally called the "first switch pays rule". Unless otherwise agreed between the parties, payphone compensation is provided in the ordinary course of business to PSPs quarterly, in arrears. Nothing in the current rules requires IXCs to provide payment in advance of this payment schedule,

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[1] See APCC Comments, p. 4, 5-7.

although PSPs are permitted and indeed encouraged to negotiate these terms with the IXCs. In this proceeding however, APCC requests that it be permitted to force IXCs who are not in bankruptcy to either prepay dial-around compensation or provide a security deposit, "if that IXC has poor payment performance or demonstrates objective indicia of credit risk.[3]" APCC's request would require a company at financial risk to provide a payment out of the ordinary course of business, thereby directly conflicting with the United States Bankruptcy Code.

Title 11 §547 of the bankruptcy code clearly does not permit the type of action requested by APCC. Under the requirements of the bankruptcy code, a debtor (such as the financially strapped IXC) cannot prefer one creditor over another. Specifically, Title 11, §547(b)(5)(B) & (C) require:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property that enables such creditor to receive more than such creditor would receive if – the transfer had not been made; and such creditor received payment of such debt to the extent provided by the provisions of this title.

For example, assume that pursuant to the ordinary course of their business relationship Footlocker owes Nike a payment for services due in 6 months. In such a circumstance, the bankruptcy code prevents Nike from forcing accelerated payments from Footlocker out of fear of financial risk. Similarly, under existing bankruptcy law, APCC cannot force an IXC, whose payments of PSP compensation may not be due for another 6 months to prepay that compensation before it is due. Such prepayment to APCC by the debtor would constitute a payment outside of the ordinary course of the debtor's business

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[2] See pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Second Order on Reconsideration, 16 FCC Rcd 8098 (*Second Order on Reconsideration*)

because it is not pursuant to the ordinary course of business terms (quarterly in arrears) between APCC and the debtor. Accordingly, through its proposals, APCC is attempting to gain preferential treatment by circumventing the bankruptcy code. As pointed out by Verizon in its petition, the Commission must harmonize its policies under the Communications Act with the bankruptcy code.[4] APCC's proposal, which would provide it with rights to which it would not otherwise be entitled under the bankruptcy code, is wildly inconsistent with that principal.

II. APCC's Proposal To Require Purchasers of Bankrupt Companies to Pay the Debts of Those Bankrupt Companies Runs Afoul of Existing Bankruptcy Law

APCC requests that the Commission promulgate new rules that would allow it to maneuver around other trade creditors when IXCs declare bankruptcy. The Commission should reject APCC's request. Indeed, any attempt by the Commission to carve out exceptions to the existing bankruptcy code would undermine the essential purpose of bankruptcy law, which is to protect the rights of creditors, by severely hampering any potential sale of a bankrupt company's assets. Ultimately no one would purchase a bankrupt company if such purchase were not made free and clear of any liens, claims or encumbrances.

> Section 363 of the United States Bankruptcy Code has clear and comprehensive rules addressing the use, sale or lease of property and provides authority for the sale of a bankrupt company free and clear of any liens, claims or encumbrances. The Commission should not assist APCC in its attempt to do an end-run around

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[3] APCC Comments, p. 4.

the bankruptcy court. While Telstar has no doubt that APCC members have suffered losses due to the spate of IXC bankruptcies, they are not alone. Virtually no member of the communications marketplace – or indeed the investing public— has remained unscathed. While TELSTAR sympathizes with APCC's losses, these losses do not justify catapulting APCC over other innocent creditors in bankruptcy court. Accordingly, the Commission should reject APCC's request that it promulgate rules that would ensure that purchasers of bankrupt IXCs existing customer accounts pay the dial-around compensation owed on those accounts. Such rules are clearly the purview of the bankruptcy court. Indeed, the bankruptcy code has clear rules regarding the rights and obligations of parties who purchase property out of bankruptcy, and which address the interests of creditors as a result of those transactions. See Title 11, U.S.C. §363 et seq. Further, APCC has provided no evidence demonstrating why existing bankruptcy law is inadequate. If however, APCC believes modifications to existing bankruptcy law are required, the appropriate course of action is to petition Congress to make changes to the law, not to request Commission assistance to skirt that law. Accordingly, the Commission should instruct APCC that it will not aide APCC in its attempts to game the system and that it will refuse to supplant the judgment of the bankruptcy court or the bankruptcy code with new rules and regulations of its own.

III. The Commission Should Reject APCC's Request For Permission To Charge IXC Customers For Dial-Around Calls In Any Circumstances.

[4] See *Verizon Petition for Emergency Relief*, p. 9 citing *LaRose v. FCC*, 494 F2d 1145 (D.C. Cir. 1974)

Perhaps most outrageous is APCC's request for permission to charge an IXC's customers for dial-around compensation in the event that an IXC refuses a PSPs request for a payment guarantee.[5] Accordingly if an IXC does not provide a payment guarantee to the PSP, APCC suggests that the PSP should be able to collect payphone compensation from the IXC's SBR customer. APCC's request is especially audacious given APCC's historical position on payphone compensation. As discussed above, current Commission rules require IXCs to compensate PSPS for each and every completed call made from a payphone regardless of whether that call is ultimately terminated by a switch based reseller or the IXC itself.[6] Prior to the *Second Order on Reconsideration*, when an IXC routed a coinless payphone call to an SBR, it was the SBR who bore the responsibility for paying the PSP for compensation for that completed call, since it was the SBR who was able to track whether the call was completed.[7] If that rule remained in effect today, the PSPs risk would be spread out over perhaps hundreds of companies instead of a mere few, making the impact to the PSP from any one particular bankruptcy less severe. However bad APCC's decision may have been in advocating the first switch pays position, it is inappropriate for APCC to now try to undo that rule through this proceeding. Moreover APCC has not demonstrated why such action by the Commission is necessary. First, SBRs and IXCs were forced to incur substantial costs to upgrade and implement new systems to provide for the data transfer to implement the first switch pays ruling advocated by APCC and ultimately adopted by the Commission. Indeed,

[5] APCC Comments, p. 6.
[6] See *Second Order on Reconsideration*, 16 FCC Rcd 8098 (2001)

thousands of work-hours and hundreds of thousands if not millions of dollars have been spent on software upgrades, IT implementation, coordination of data transfer, contract negotiation, and litigation to implement the new payphone rules industry wide. Now less than eight months after implementation, APCC would have the Commission undo those rules where they see fit, forcing SBRs to become the guarantors of their IXC providers. Such a request is inappropriate and should be rejected out of hand. Second, if APCC wishes to request modification of the Commission's payphone compensation regulations, it should petition the Commission for reconsideration of its Payphone Orders, not attempt to push through its requested modifications in the Comment phase of this proceeding. The modifications proposed in APCC's Comments raise serious issues, including those related to third party liability under the Uniform Commercial Code and would need to be fully litigated with adequate notice to interested parties.

Third, APCC has not demonstrated that requiring SBR customers to cover the debts of IXCs is necessary. The Commission has permitted --and in fact encouraged-- PSPs to enter into direct agreements with SBRs to address payphone compensation issues. Accordingly, PSPs now have the option of choosing to either spread the risk of recovery over a larger pool of prospective customers by entering into meaningful negotiated agreements with multiple SBRs, or to accept payment only from IXCs.

In any event, it is inappropriate for APCC to suggest that SBRs without a specific agreement between itself and the PSP should be responsible for IXC debts to PSPs. Any requirement that would force IXC customers to pay PSPs if their IXC providers fail to prepay, is illogical, patently unfair, and discriminatory. Assume this example: Nike

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[7] See *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration*, CC Docket No. 96-128, 11 FCC Rce 21233, 21277 (1996) (*Payphone*

makes athletic shoes. To make the shoes, it buys leather from Leather Co. Nike then sells the shoes to Footlocker. Under APCC's proposal, if Nike failed to pay Leather Co., Footlocker would be required to pay twice – Leather Co. could collect from Footlocker even though Footlocker has paid Nike in full for the shoes and even though Footlocker has no relationship with Leather Co. Similarly, APCC's proposal could require SBRs to pay double compensation – to both the PSP and the IXC, which is not only unfair but also discriminatory. This Commission should not even entertain such a suggestion.

CONCLUSION

There is no doubt that many businesses and trade groups have been seriously harmed as a result of the rash of bankruptcies in the telecommunications industry. These losses however, do not warrant the relief sought by APCC or Verizon in this proceeding. In promulgating the rules comprising the bankruptcy code, Congress has fully addressed the rights and responsibilities of debtors and creditors within the purview of a corporate bankruptcy. It is inappropriate for APCC or Verizon to attempt to encourage the Commission to implement rules to enable them to circumvent existing bankruptcy law. The bankruptcy code was drafted by Congress to ensure the orderly distribution of the debtor's estate. Any agency rules promulgated to give one group preferential treatment over another would contravene Congress' intent and would be seriously undermine the bankruptcy code. Accordingly, Telstar respectfully urges the Commission should reject Verizon's and APCC's requests in this proceeding.

Order on Reconsideration).

Similarly, APCC should not be permitted in this proceeding to mount what is essentially a thinly veiled petition for reconsideration of the Commission's Payphone Orders. First there is no reason to once again reopen and modify the Commission's payphone rules that were revamped only eight months ago to adopt the "first switch pays" rule advocated by APCC. APCC has not presented any credible evidence as to why it is necessary to now modify those rules. If however APCC feels the need to raise additional payphone compensation issues with the Commission, it should do so in Docket No. 96-128 – not here. Accordingly, the Commission should deny the requests raised in APCC's Comments, along with Verizon's petition for emergency relief.

Respectfully submitted,

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